U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: JUN 01 2015

FILE #:
PETITION RECEIPT #:

IN RE: Petitioner:
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

NO REPRESENTATIVE OF RECORD

INSTRUCTIONS:

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be remanded to the director in accordance with the following.

The petitioner describes itself as a Montessori school. It seeks to permanently employ the beneficiary in the United States as an instructional coordinator. The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).

Section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees. *See also* 8 C.F.R. § 204.5(k)(1).

The regulation at 8 C.F.R. § 204.5(k)(2) defines the terms "advanced degree" and "profession." An "advanced degree" is defined as:

> [A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

A "profession" is defined as "one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." The occupations listed at section 101(a)(32) of the Act are "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

The regulation at 8 C.F.R. § 204.5(k)(3)(i) states that a petition for an advanced degree professional must be accompanied by:

> (A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or
>
> (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

In addition, the job offer portion of the labor certification must require a professional holding an advanced degree. *See* 8 C.F.R. § 204.5(k)(4)(i).

Therefore, an advanced degree professional petition must establish that the beneficiary is a member of the professions holding an advanced degree, and that the offered position requires, at a minimum, a

professional holding an advanced degree. Further, an "advanced degree" is a U.S. academic or professional degree (or a foreign equivalent degree) above a baccalaureate, *or* a U.S. baccalaureate (or a foreign equivalent degree) followed by at least five years of progressive experience in the specialty.

As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL).[1] The priority date of the petition is May 20, 2010.[2]

Part H of the labor certification states that the offered position has the following minimum requirements:

H.4. Education: Master's degree in Education.
H.5. Training: None required.
H.6. Experience in the job offered: 30 months.
H.7. Alternate field of study: Sociology.
H.8. Alternate combination of education and experience: Master's degree and two years of experience.
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: 30 months of experience as a Montessori teacher.
H.14. Specific skills or other requirements: "Any suitable combination of education, training, or experience is acceptable.

The record contains four evaluations of the beneficiary's foreign educational credentials submitted both with the initial filing and on appeal. The director's decision denying the petition concludes that the beneficiary's foreign education is not the foreign equivalent of a Master's degree in Education or Sociology to qualify as an advanced degree professional and to meet the terms of the labor certification.

The petitioner appealed the director's decision. The petitioner's appeal is properly filed and makes a specific allegation of error in law or fact. We conduct appellate review on a *de novo* basis.[3] We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal.[4] We may deny a petition that does not comply with the technical requirements of the law even if the director does not identify all of the grounds for denial in the initial decision.[5]

[1] *See* section 212(a)(5)(D) of the Act, 8 U.S.C. § 1182(a)(5)(D); *see also* 8 C.F.R. § 204.5(a)(2).
[2] The priority date is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).
[3] *See* 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).
[4] The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).
[5] *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th

On appeal, the petitioner submitted an additional evaluation seeking to demonstrate that the beneficiary's foreign degree is equivalent to a U.S. master's degree.

The evidence submitted on appeal has overcome the initial basis of the director's decision. We determine that the beneficiary's foreign degree in this matter is the foreign equivalent of the required Master's degree in Education or Sociology.[6]

However, the petition is not approvable at this time because, beyond the decision of the director, the petitioner has not established that it had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2). In addition, beyond the director's decision, based on evidence submitted, it is not clear that the petition is based on full-time employment. Therefore, we remand the matter to allow the petitioner an opportunity to fully address these issues.

With respect to the issue of ability to pay the proffered wage, the record indicates the petitioner is structured as a nonprofit corporation and filed its tax returns on IRS Form 990-EZ, Short Form Return of Organization Exempt from Income Tax. According to the tax returns in the record, the petitioner's fiscal year is based on the fiscal year beginning June 1st through May 31st of the following year. Our April 17, 2014 Notice of Intent to Dismiss (NOID) notified the petitioner that it had not established its ability to pay the beneficiary's proffered wage beyond the decision of the director. In response to our NOID, the petitioner provided its 2012 tax return.

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.[7] If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonegawa,* 12

Cir. 2003).

[6] U.S. Citizenship and Immigration Services (USCIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility. USCIS may evaluate the content of the letters as to whether they support the alien's eligibility. *See id.* at 795. USCIS may give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)); *Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011)(expert witness testimony may be given different weight depending on the extent of the expert's qualifications or the relevance, reliability, and probative value of the testimony).

[7] *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), aff'd, No. 10-1517 (6th Cir. filed Nov. 10, 2011).

I&N Dec. 612 (Reg'l Comm'r 1967).

Here, the ETA Form 9089 was accepted on May 20, 2010. The proffered wage as stated on the ETA Form 9089 is $15.42 per hour ($32,074.00 per year).[8]

We note that the petitioner has claimed different amounts for the proffered wage. The record contains a letter from counsel for the petitioner, dated April 6, 2012, which states that the proffered wage is $28,064.40 (35 hours per week for 52 weeks). The petitioner's response to the director's Request for Evidence (RFE), dated May 17, 2013, states the proffered wage as $32,073.60. The petitioner's response to our NOID, dated May 15, 2014, states the proffered wage as $28,064.40.

We further note that the employment agreement in the record for August 1, 2012 until June 10, 2013 states a wage of $18,840.00,[9] which is below the annual proffered wage and appears to be based on 35 hours per week but only for ten months. While the petitioner is not required to employ the beneficiary in the position offered until the time of adjustment to lawful permanent resident status, the wage at that time would be based on the annualized proffered wage of $32,074. Should the petitioner assert a lower wage based on 35 hours, it would be required to demonstrate that the position was advertised in that manner to potential U.S. workers.

The petitioner's IRS Form 990 demonstrated its surplus (or deficit) as detailed in the table below.

- In 2010, the petitioner's IRS Form 990 stated a surplus of $10,935.00.[10]
- In 2011, the petitioner's IRS Form 990 stated a surplus of $13,573.00.
- In 2012, the petitioner's IRS Form 990 stated a deficit of $45,080.00.

In the instant case, the petitioner has employed the beneficiary since July 18, 2008. The record reflects that the beneficiary was paid the following amounts from 2010 onward in relation to the petitioner's surplus (or deficit), as shown in the table below.

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[8] The occupation of the offered position is determined by the DOL and its classification code is notated on the labor certification. O*NET is the current occupational classification system in use by the DOL. Located at http://online.onetcenter.org, O*NET is described as "the nation's primary source of occupational information... containing information on hundreds of standardized and occupation-specific descriptors." *See* http://www.onetcenter.org/overview.html (accessed May 14, 2015). O*NET incorporates the Standard Occupational Classification (SOC) system, which is designed to cover all occupations in the United States. In the instant case, the DOL categorized the offered position under the O*NET-SOC code of 25-9031.00, Instructional Coordinators, at a Level I wage. The Foreign Labor Certification Data Center, Online Wage Library, states that the Level I wage of Instructional Coordinators was $15.42 per hour or $32,074.00 per year for the year of the priority date in the county and state where the position is located.
See http://www.flcdatacenter.com/OesQuickResults.aspx?code=25-9031[redacted]year=15&source=1

[9] In addition, the record does not contain any evidence demonstrating whether the prevailing wage determination was based on 35 hours per week or evidence demonstrating that the instant position was advertised in this manner. If the position offered is intended to be 35 hours per week, the petitioner should submit documentation to the director of the prevailing wage determination and the advertisements for the position offered demonstrating that the position is for 35 hours per week and not 40 hours.

[10] IRS Form 990-EZ, Part I, line 18 (2010 through 2012).

Year	Proffered Wage	Wages Paid (Form W-2)	Deficiency in Wages Paid	Surplus or Deficit
2009	$32,074.00	$15,464.08	$16,609.92	$29,784.00 (surplus)
2010	$32,074.00	$15,360.23[11]	$16,713.77	$10,935.00 (surplus)
2011	$32,074.00	$18,432.64	$13,641.36	$13,573.00 (surplus)
2012	$32,074.00	$13,208.90	$18,865.10	-$45,080.00 (deficit)
2013	$32,074.00	$7,562.40	$24,511.60	Not submitted[12]

This demonstrates that the petitioner's surplus was only sufficient to pay the difference between the proffered wage and the wages paid to the beneficiary in 2009. The petitioner's surplus in 2010 and 2011 did not exceed the difference between the proffered wage and the wages paid to the beneficiary in 2010 and 2011, and in 2012, the petitioner had a deficit, rendering it unable to pay the deficiency in wages paid to the beneficiary.

The record also contains the petitioner's profit and loss statement from June 2010 through April 2011 and a balance sheet as of April 30, 2011. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, we cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967). In response to our NOID, the petitioner states that its 2012 tax returns included "Other Expenses," such as "supplies" and "advertising" and that the petitioner could cut back on these expenses to cover salary expenses. However, even if the petitioner were able to cut back on its supplies and advertising, this would not account for the deficiency in 2010. Further, it is unclear how the petitioner can manage to realistically cut back on supplies and advertising for 2012 to overcome a deficiency of $14,855.50 without severely limiting the basic needs of the school.[13] In examining the tax returns in the record, the petitioner's contributions, gifts and grants, together with the program revenue totals are all relatively low in all tax years represented. Accordingly, after

[11] This amount is taken from two Forms W-2 issued to the beneficiary in 2010. The petitioner states that two Forms W-2 were issued to the beneficiary due to a change in business structure from a Limited Liability Company (LLC) to a nonprofit organization.

[12] We note that the tax return for 2013 was not yet available when this appeal was filed. The petitioner should provide the director with its tax returns for 2013 and 2014 and the Form W-2 issued to the beneficiary for 2014.

[13] We also note that the petitioner has filed H-1B petitions for at least two other individuals, one whose validity periods are from 11/12/2010 through 6/07/2014 ( ) and another whose validity periods are from 4/9/2012 through 8/11/2015 ( ). The director may consider the petitioner's obligation under 20 C.F.R. §§ 655.715 to pay H-1B wages in the totality of the circumstances and may request evidence of wages paid to these individuals in relation to the totality to determine whether the petitioner has the ability to pay the beneficiary's proffered wage.

considering the totality of the circumstances, the petitioner has not established its continuing ability to pay the proffered wage to the beneficiary since the priority date.

In addition, it is unclear whether the position offered is for permanent full-time employment. The job offer must be for a permanent and full-time position. *See* 20 C.F.R. §§ 656.3; 656.10(c)(10). DOL precedent establishes that full-time means at least 35 hours or more per week. *See* Memo, Farmer, Admin. for Reg'l. Mngm't., Div. of Foreign Labor Certification, DOL Field Memo No. 48-94 (May 16, 1994).

The ETA Form 9089 states that the petitioner has employed the beneficiary 35 hours per week since 2008, but as shown above, the wages paid to the beneficiary reflect part-time employment. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). We also note from the employment agreement in the record that the beneficiary's salary may be based upon a ten month schedule. A position for a teacher is generally considered full-time employment despite a ten-month schedule but is based on payment of wages year-round. *See Matter of Dearborn Public Schools*, 91-INA-222 (BALCA Dec. 7, 1993);[14] *see also in contrast Matter of Police Athletic League*, 2004-INA-129 (BALCA Dec. 5, 2005), where a position for an adult education teacher was found not to be full-time. In this case, the record is unclear as to whether the beneficiary's salary represents year-round wages. The petitioner should resolve this issue on remand.

In view of the foregoing, the previous decision of the director will be withdrawn. The petitioner has established that the beneficiary meets the educational requirements of the labor certification. However, the petition is remanded to the director for consideration of the petitioner has the ability to pay the proffered wage and whether it can demonstrate that the position offered to the beneficiary is for full-time, year-round employment. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director will review the entire record and enter a new decision.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

ORDER: The director's decision of June 14, 2013 is withdrawn; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision.

[14] In contrast to positions for gardeners, groundskeepers and similar jobs, which are only performed for ten months of the year or less, and, are therefore, considered seasonal rather than permanent, full-time employment. *See Vito Volpe Landscaping*, 1991-INA-300 (Sept. 29, 1993) (en banc).